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In The

Supreme Court of the United States

78-562

October Term, 1978

No.

MATTHEW MADONNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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No.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner, Matthew Madonna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 1, 1978.

OPINION BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals for the Second Circuit, in a unanimous *per curiam* opinion, affirmed an order of the United States District Court, Southern

District of New York (Carter, J.), which denied petitioner's motion filed pursuant to Rule 35 of the Federal Rules of Criminal Procedure seeking to vacate or modify the 30 year sentence imposed for violation of the federal narcotics laws.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within thirty (30) days of the entry of the judgment of the Court of Appeals affirming the order appealed from.

QUESTIONS PRESENTED

1. Whether it is illegal and contrary to congressional intent to impose consecutive sentences following conviction for one count of conspiracy to violate 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) and a substantive count charging distribution of a controlled substance and possession with intent to distribute in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) where, under the facts as alleged in the indictment and established at trial, the substantive count was the object of the conspiracy.

2. Whether the sentencing court's failure to afford defense counsel any opportunity to rebut false, inaccurate and misleading information supplied by the Assistant United States Attorney and contained in the pre-sentence report in aid of sentence was fundamentally unfair and improper.

STATUTES INVOLVED

The statutory provisions involved are 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A).

STATEMENT OF FACTS

The petitioner Matthew Madonna was tried in the Southern District of New York before the Honorable Robert L. Carter and a jury and was convicted on one count of possession of heroin with intent to distribute it and one count of conspiracy to possess and to import heroin, in violation of 21 U.S.C. §§841(a)(1) and 952(a). He was sentenced to the maximum term of fifteen years on each count, the terms to run consecutively.

No testimony or other evidence directly implicated Madonna. The Government's case turned on whether a car he had rented in a false name was utilized with his knowledge for the purpose of transporting heroin. The trial testimony indicated that a friend of Madonna's, the co-defendant Larca, had loaned the car to one Boriello, another co-defendant, who had picked up heroin and put it in the trunk of the car. Boriello was subsequently arrested and later, under Government control, drove the car to a mid-Manhattan street corner where Larca and Madonna met him and took charge of the car. At this point Larca and Madonna were arrested, and the car they were sitting in was seized. A search of the vehicle revealed a small quantity of heroin, found in the trunk.

The question whether Madonna had prompted Larca to lend the vehicle to Boriello and the reasons for Madonna's presence at the Manhattan location to regain his car were thus the crucial, and indeed the only, issues in the prosecution's case against Madonna. Neither Boriello, the Government's principal witness who strongly implicated Larca but offered absolutely no testimony inculcating Madonna, nor any other participant in the venture implicated Madonna. Thus, the case against Madonna consisted of inferences sought to be drawn from the use of the car rented under an assumed name and some tenuous and dubious allegations of a prior similar act.

REASONS FOR GRANTING THE WRIT

I.

The sentence was illegal.

Federal Rule of Criminal Procedure 35 provides as follows:

"The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law."

The imposition of cumulative sentences rather than concurrent sentences for conviction of one count of conspiracy to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 952(a) and one substantive count under 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A), where the substantive count was also an object of the conspiracy, is, we respectfully contend, the imposition of an illegal sentence.

Prior to the enactment of the Controlled Substances Act of 1970, the controlling drug statutes were cumulatively punishable. *Pinkerton v. United States*, 328 U.S. 640 (1946). The rationale for permitting multiple punishment in this context was founded solely on an interpretation of congressional intent relative to the then existing federal narcotics statutes.

Traditionally, the courts have held conspiracy and the completed substantive offense to be separate crimes. *See, e.g., Iannelli v. United States*, 420 U.S. 781, 95 S. Ct. 1284 (1975). The two did not merge in marked contrast to the merger of an attempt with the completed act. Consequently, multiple punishment was permitted in the form of consecutive sentencing where a conviction was obtained for separate counts of conspiracy and any substantive offense committed in furtherance of the conspiracy. *Pereira v. United States*, 347 U.S. 1, 74 S. Ct. 358 (1954).

In *Iannelli v. United States*, *supra*, although the majority of this Court found no merger of the substantive gambling count and the conspiracy charged, the Court cautioned that imposition of cumulative sentences for the joint violation should depend on the facts of the particular case.

Because the very nature of conspiracy posed distinct dangers quite apart from those of the substantive offense and presented a greater potential threat to the public than individual crimes, the Court has consistently attributed to Congress:

"a tacit purpose . . . to maintain a long-established distinction between offenses essentially different." *Callahan v. United States*, 364 U.S. 587, 594, 81 S. Ct. 321 (1961).

Therefore, the issue at bar is not whether Congress could have authorized the imposition of cumulative sentences for a conspiracy and the completed substantive offense committed in violation of Controlled Substances Act of 1970. Clearly, there is no constitutional impediment, and we so concede, to Congress' authorizing cumulative sentences for a single act that may violate more than one criminal statute when the offenses created by the statute are not identical.

Rather, the issue is whether Congress intended to exercise its power to authorize consecutive sentences for Madonna's single transaction which violated more than one section of the Act. Unless an intention can be found from the face of the Act or from its legislative history to authorize multiple punishments for a single factual transaction, the courts are obliged to construe the Act against the harsher penalties which result from cumulative punishments. *See: Milanovich v. United States*, 365 U.S. 551, 81 S. Ct. 728 (1961); *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451 (1959); *Prince v. United States*, 352 U.S. 322, 77 S. Ct. 403 (1957).

It is, therefore, necessary to examine the Controlled Substances Act of 1970 and its legislative history in order to fully determine congressional intent with regard to multiple sentencing under the Act. The stated purpose of the Act is to:

"revise the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations." 1970 U.S. Code Cong. & Admin. News at 4570.

Thus, this case can be distinguished from *Gore v. United States*, 357 U.S. 386, 78 S. Ct. 1280 (1953), where cumulative sentences for separate violations of the narcotics control laws resulting from one transaction were upheld.

In *Gore*, the separate offenses were created by Congress at different times and the background of the several statutes led to the conclusion that Congress did intend to authorize multiple punishments.

In this case, however, all of the offenses charged are rooted in one legislative enactment (the 1970 Act), and there is nothing in the history of that enactment to suggest a congressional

purpose to permit or require multiple punishment for a conspiracy and a substantive offense which form part of one transaction.

The structural make-up of the Act further supports the proposition that convictions for conspiracy under the Act and for substantive offenses which occur in furtherance of the conspiracy should merge for the limited purpose of sentencing.

Subchapter 1 deals with "Control and Enforcement", the cornerstone of which is Section 841(a)(1) which states that:

"it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

Subchapter 2 deals with "Importation and Exportation", the foundation of which is Section 952(a), which makes it

"unlawful to import . . . any controlled substance."

Each subchapter contains a separate section prohibiting attempts and conspiracies. Sections 846 and 963, respectively, state:

"Any person who *attempts or conspires* to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the *attempt or conspiracy*." (Emphasis added.)

The structure indicates several very important aspects with regard to congressional intent.

First, conspiracies are to be treated no differently from the substantive offense, the commission of which was the object of the conspiracy. The punishments are identical. In fact, the conspiracy sections incorporate by reference the punishment structure of the corresponding substantive sections. Hence, Congress equated conspiracy with substantive violations for the purpose of punishment.

This is echoed by the stated purpose of the Act which was quoted earlier, namely to review:

"The entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations." 1970 U.S. Code Cong. & Admin. News at 4570.

Since the rationale underlying those decisions which allow multiple punishment where conspiracy was involved is based on conspiracy statutes which were enacted wholly apart from the substantive statutes and which carried penalties different from those of the substantive sections, those decisions are of no weight in deciding the present issue.

Secondly, for the purpose of punishment, the statute places attempts and conspiracies on the same footing. It is hornbook law that an attempt merges with the completed offense for punishment purposes. Separate punishment is never permitted for an attempt and the completed act.

Since attempts and conspiracies are equated for punishment purposes and are specified as alternative methods of violating Sections 846 and 963, it would be anomalous to impute to Congress an intent to punish cumulatively for one but not the other. Hence, Congress intended a conspiracy to merge with the completed offense for punishment purposes.

Thirdly, to accomplish the stated purpose of the Act and provide a consistent method of treatment of all persons accused of violations, Congress established precise punishments.

Section 401(b)(1)(a) established a maximum punishment for a violator of Section 401(a). As previously noted, Sections 846 and 963 mandated the same punishment for the conspiracy to violate the substantive statute.

A sentence of thirty (30) years was not prescribed except in the case of a defendant who had one or more prior convictions for an offense punishable under the subsection or for a felony under the drug laws of the United States.

To deal with the large-scale violators, Congress enacted a separate section which proscribed "a continuing criminal enterprise" to which it attaches more severe penalties.

Section 848 imposes a minimum sentence of ten years to life imprisonment and a fine of up to \$100,000 on any person who violates any provision of subchapters 1 or 2, which is a felony, where such violation is part of a continuing series of violations which are undertaken in concert with five or more other persons with respect to whom such person occupies the position of organizer, and from which such person obtains substantial income.

As the legislative history of this section points out:

"The [statute] provides severe criminal penalties for persons engaged in illicit manufacture or sale of controlled drugs primarily for the profit to be derived therefrom. Section [848] provides that persons engaged in continuing criminal enterprises involving violations of the [statute] . . . shall be harshly dealt with.

This section [848] is the only provision of the [statute] providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation.

The penalties for other violations of the [statute] are, in general less severe. . . ." 1970 U.S. Code Cong. & Admin. News at 4575-76.

The petitioner is neither a prior violator of any narcotics law of the United States or, under the facts of this case, any such large scale violator.

Thus, Congress has provided a means by which certain offenses can be more severely dealt with. The Court should not allow this scheme to be circumvented by an improper pyramiding of sentences which Congress in no way intended.

In sum, it can be gleaned from the Controlled Substances Act of 1970, together with its legislative history, that the pyramiding of sentences in the instant case is, in fact, illegal. Congress did not intend that consecutive sentences be imposed for a conspiracy count and a substantive count where only one transaction formed the basis of both counts.

The sentence should, therefore, be corrected and reduced so that the sentence will run concurrently for the two counts.

The position we advance has received the support of various circuit courts in analagous situations.

In *United States v. Oropeza*, 564 F.2d 316 (9th Cir. 1977), the court vacated consecutive sentences imposed for distribution of heroin and possession with intent to distribute.

In so doing, the court relied upon reasoning evinced by three other circuit courts. *United States v. Stevens*, 521 F.2d 334 (6th Cir. 1975); *United States v. King*, 521 F.2d 356 (6th Cir. 1975)¹; *United States v. Atkinson*, 512 F.2d 1235 (4th Cir. 1975), *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied*, 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50 (1975); *United States v. Howard*, 507 F.2d 559 (8th Cir. 1974).

We submit the reasoning articulated by the court in *United States v. Oropeza*, *supra*, at p. 324, is admirably applicable at bar:

"The evidence as to Oropeza's and Minton's convictions for possession with intent to distribute on October 15 arose only from their association with the conspiracy and their actions in the October 15 distribution. The circumstantial evidence on which their possession convictions rest was identical to the evidence supporting their distribution convictions. We vacate the sentences imposed for these convictions and remand to the district court for resentencing."

The circumstantial evidence against Madonna, by virtue of the renting of the car under the assumed name and his presence in it at the rendezvous, is the identical evidence upon which the conviction for possession with intent to distribute and conspiracy to possess and import rests.

It is not significant that the words after "possession" and "conspiracy to possess" vary at bar. The key is the possession, and it is the foundation and a necessary part of both crimes.

1. Concurrent sentences upon either the conviction for possession with intent to distribute or conspiracy to distribute was vacated since both were based upon a single act of possession. It should be noted that the current Solicitor General, who sat as a member of the court in this case, concurred and opted for vacature of the convictions themselves. He stated at p. 359 "... the Congress did not intend to permit a defendant to be punished twice for a single act prosecuted as two separate offenses."

It is this identity and the absence of evidence of congressional intent to impose multiple punishment for a single criminal act which bars *cumulative punishment*. *United States v. Oropeza, supra*.

The same result is achieved if we put the emphasis on the possession as in *United States v. Atkinson, supra*, where the court stated at page 1240:

"[12] Appellant Molden Atkinson asserts that the two 15-year sentences imposed on him exceeded the permissible sentencing limit for his involvement in the drug transaction. On the facts of this case, we agree. His possession of the drug was not shown to exist separately from the moment in which the heroin was transferred to the government agent. Only when he produced the heroin for sale was his possession shown to exist. Under these circumstances, while the single act was proof of two offenses, we are of opinion it was not the intent of Congress to increase the maximum sentence when two violations of the same subsection of the statute are shown by a single act. *Cf., Prince v. United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370 (1957)."

Madonna's participation in the conspiracy to import and possession to distribute all stem from the presence in the car and assertion of dominion over it. *Cf., United States v. Kearney*, 560 F.2d 1358 (9th Cir. 1977); *King v. United States*, 565 F.2d 356 (5th Cir. 1978).

We submit the foregoing cases are inapplicable, since neither raised the issue of congressional intent as manifested in the Drug Act of 1970, nor the identity of treatment of an attempt and a conspiracy.

In *King, supra*, the issue of identical acts to bottom both convictions was not raised in the context of double punishment, but only on the issue of double jeopardy. The sentences in *King* were attacked only on the ground of being cruel and unusual.

In *Kearney, supra*, the court adhered to the rule of "required proof" and rejected the "same evidence" rule, but did not discuss it in light of the clear language, structure and intent of the Drug Control Act of 1970. Beyond this, the vitality of *Kearney, supra*, seems to have been drained by the Ninth Circuit decision in *Oropezo, supra*.

Similarly, in *United States v. Olivas*, 558 F.2d 1366 (10th Cir. 1977), the court went so far as to vacate a concurrent sentence in an analagous situation, holding that the single transaction did not support the imposition of sentences for more than one crime.

In ruling against Madonna, the position and statutory analysis raised herein, the Second Circuit places itself in square conflict with other circuits which have considered and decided the issue at bar. This conflict among the circuits in construing and applying a series of narcotics control statutes national in scope and applied daily raises an important question crying out for final resolution by this nation's Court of last resort.

The question of when and under what circumstances consecutive sentences can be imposed under given federal sentences is, standing by itself, an important question of federal criminal law worthy of discretionary review.

Thus, in *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207 (1977), this Court granted certiorari and, as per the rule of consecutive sentences to be imposed following convictions in federal narcotics cases involving concerted action of a conspiratorial nature, held that consecutive sentences could not

be imposed upon a defendant convicted of conspiracy to distribute narcotics as well as conducting a continuing criminal enterprise with narcotics distribution at the fountainhead.

The need for final action by this Court undoubtedly prompted the granting of further appellate review in *Jeffers* and is equally necessary for cases such as the one at bar. *See also*, in other contexts and other statutes, *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221 (1977); *Simpson v. United States*, 435 U.S. 6 (1978).

Accordingly, the petition at bar should be granted, and further and final appellate review should be granted.

II.

The sentence was imposed in an illegal manner.

Although under the current state of the law the severity of a particular sentence is not reviewable on federal appeal, the courts have considered the question of sentence review in other ways.

Thus, courts have considered the prejudicial effect on a sentence under circumstances where a prosecutor submitted a supplementary sentence memo making allegations against the defendant which the defendant was denied a reasonable opportunity to rebut, challenge or explain. The court in that case set the sentence aside and remanded the case for resentencing. *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973).

At the time of sentence in the case at bar, it was alleged that the probation report contained incorrect data which had been furnished by the Government. Defense counsel sought an

evidentiary hearing to rebut the allegations. The court felt such a hearing was unnecessary.²

However, the pyramiding of sentences in light of this trial record suggests there was a "significant possibility" these statements were not totally ignored by the court. As indicated in the record, the petitioner's role in this case, as construed in the light most favorable to the Government, was that of a subordinate.

A recent spate of cases have held that where there is a:

"significant possibility that the sentence may have been affected by a material misstatement or misleading statement in the presentence report, the sentence should be vacated." (Emphasis added.)

In *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970), the sentencing court was misled by the probation report to believe the defendant had been involved in other bank robberies; information which had, in fact, been supplied by the defendant himself to the prosecutor. The defendant attempted to rebut this and other misinformation, but was not allowed to do so. The court vacated the sentence and sent the matter back for resentencing, stating at p. 819:

"Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris v. United States, 382 U.S. 162, 166, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965)."

2. Inexplicably Judge Carter denied a hearing or any other inquiry, notwithstanding the fact that Madonna was in custody following the court's revocation of bail after the jury returned its guilty verdict.

When a district court imposed a maximum sentence upon a defendant in reliance upon a sentencing memorandum and *then* placed the burden upon the defendant to rebut this information, the Court of Appeals vacated the sentence and sent the matter back for resentencing. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

In *United States v. Bass*, 535 F.2d 110 (D.C. Cir. 1976), the court gave a full exposition on what matters should properly be considered by a sentencing judge. The court refused to vacate the sentence at that stage only because the defendant, through counsel, did not deny or attempt to deny the matters which he claimed were false. The court suggested, however, that on a Rule 35 motion, these matters could be disputed and so did not disturb the ten year sentence imposed for narcotics transactions.

In *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976), the court vacated a ten year sentence which was based upon consecutive five year sentences on two counts. The court, at page 101, stated the basis for vacating the sentence which, although within legal limits, was based on erroneous information:

"On the other hand, a motion to vacate a sentence on the ground that the sentencing judge acted on the basis of erroneous assumptions or information that was materially incorrect rests on a different footing; in that case '[I]t is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.' *Townsend v. Burke*, 334 U.S. 736 at 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690 (1948)."

In *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976), the court vacated and remanded a thirty (30) year sentence based upon two consecutive 15 year terms. The Special State Prosecutor submitted a pre-sentence memo in the form of a letter alleging certain extensive *involvements* of the defendant, his affluence, etc. The defense counsel sought to rebut this, but no opportunity was afforded and the defendant was sentenced. Except for the source of the information, this is similar to the situation at bar. In setting aside the sentence, the court held that such a result was warranted even where the possibility of reliance on misinformation is shown:

"We have held that a defendant must be permitted to state his version of the facts to the court; where the possibility of reliance on misinformation is shown, this right must be extended to permit that presentation by the defendant which will enable the sentencing judge to grasp the relevant facts correctly. *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973); *see also United States v. Rollerson*, 491 F.2d 1209, 1213 (5th Cir. 1974); *United States v. Powell*, 487 F.2d 325, 329 (1974). In appropriate circumstances, this may mean that a defendant will be permitted to submit affidavits or documents, supply oral statements, or even participate in an evidentiary hearing; alternatively, further corroboration of sentencing data may be required. And while in such cases the procedure to be followed lies within the sound discretion of the sentencing judge, a court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of that discretion." *United States v. Robin*, *supra*, at p. 779.

At bar, there was a whole host of material misstatements and misleading statements. In his allocution on sentence, the prosecutor contended that Madonna's prior manslaughter conviction at the age of 18 was drug-related. This was untrue and was capable of easy refutation had an opportunity been provided.

In addition, the prosecutor brought into the sentencing the fact that petitioner's brother absconded in a totally unrelated case pending in the Eastern District of New York.

Prosecutor Flannery repeated the unsupported allegation of the relation of petitioner's prior offense to drugs. He improperly and erroneously contended that the petitioner's prior incarceration caused the State prison authorities to determine that he was not likely to reform. This material is contradicted in specifics in the affidavit which accompanied the Rule 35 application.

The prosecutor also made allusion to alleged parole violations under the earlier conviction. He made completely unfounded and unsupported allegations that petitioner provided money for counsel for other people and to silence witnesses, neither of which charges was true or proven, much less suggested, by the testimony at the trial.

Mr. Flannery alluded to a *Nebia* hearing³ and allegations concerning checks which were not borne out by the record for, indeed, after the *Nebia* hearing, the bail was accepted and the petitioner released. He further contended that the petitioner offered no proof of the route of the money and when counsel attempted to interject, the sentencing court evidenced agreement with the argument of the prosecution.

3. The hearing was held on the prosecution's motion to insure that the security posted in support of the petitioner's bail bond was not derived from illegal or illicit sources.

We submit the sentencing court overlooked an extensive explanation in affidavit form of all of the petitioner's finances when it was assigned the case and decided to continue the bail set by the Magistrate and arraigning judge. That affidavit and exhibits are part of the court file.

No opportunity was provided counsel to rebut these unrelated, irrelevant misstatements other than to ask the petitioner if he had anything to say. It is difficult, if not impossible, to say with any certainty that a sentencing court was not affected by these misstatements.

Indeed, in light of the petitioner's role in this specific case, as evidenced by the trial record, we suggest a pyramided sentence of thirty (30) years strongly supports the contention that the sentencing court was affected.

In addition to the possibility of being influenced by this inaccurate material, the court relied on other considerations which are not based on the record.

Judge Carter went on to assert that his basis for believing society is entitled to a respite from petitioner was his control over the "machinery" able to handle twelve pounds of heroin. The trial record in this case does not support or suggest any such control. An earlier statement by the court contradicted this conclusion.

We contend Judge Carter singled out petitioner for a particularly harsh sentence, in light of this trial record, on an unwarranted and unsupported conclusion that it affected an area of New York City about which the court had particular concern.

A district judge certainly has a right to his opinion on social conditions and may, under appropriate circumstances, publicly express concern about them. But, we contend, he should avoid even the appearance of punishing an individual defendant as a result of frustration with the existence of those conditions.

The statement the court advanced concerning an area of New York City and the context within which it was made leads to a clear impression that petitioner was being sentenced because of the court's special concern based upon facts and evidence outside the record.

It is respectfully submitted that this sentence is based on a series of unsubstantiated conclusions, unwarranted assumptions and personal grievances.

This indicates there were considerations in the sentence not based upon the trial record, but rather on outside information which petitioner should have been afforded an opportunity to rebut, explain or, at the very least, clarify and place in a proper context.

The fact that there is a significant possibility the sentencing court relied upon incorrect, misleading and improper material is heightened by the disparity of the sentence as amongst petitioner's co-defendants.⁴

As repeatedly indicated, no matter how broadly the trial record is interpreted, it does not sustain the sentence imposed on petitioner. The courts have not hesitated to correct disparity.

"However, where the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity. In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration of

4. The co-defendant Larca received a sentence of 15 years. The co-defendant Klinger received a sentence of six months.

the federal system." *United States v. Wiley*, 278 F.2d 500, 503 (7th Cir. 1960).

See also, *United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976).

The "cert worthiness" of this question is highlighted by this Court's decision in *United States v. Grayson*, ____ U.S. ____, 98 S. Ct. 2610 (1978), where the Court granted certiorari to ultimately approve the practice of enhancing a defendant's sentence under circumstances in which the trial judge finds that, in testifying in his own defense, the accused willfully gave material false testimony.

The holding in *Grayson* underscores, albeit in a slightly different context, the need for a ruling concerning what other criteria may properly be considered in deciding upon the length of a penal sentence.

The current aggressiveness of prosecutors seeking to have input upon and to shape sentencing, and the sheer passage of time since this Court's decisions in *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, and *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948), underscore the need for final appellate review by this Court.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

s/ Gustave H. Newman
Attorney for Petitioner

Roger Bennet Adler
On the Brief

APPENDIX A — DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
DATED SEPTEMBER 1, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1106—September Term, 1977.

(Argued July 17, 1978 Decided September 1, 1978.)

Docket No. 78-1131

UNITED STATES OF AMERICA,

Appellee,

—v.—

MATTHEW MADONNA,

Defendant-Appellant.

Before:

MESKILL, *Circuit Judge*, and
DUMBAULD* and PORT,** *District Judges.*

Appeal from an order entered in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, denying appellant's Rule 35 motion to vacate or reduce a 30-year sentence imposed for violation of federal narcotics laws.

Affirmed.

GUSTAVE H. NEWMAN, New York, New York, *for*
Defendant-Appellant.

* Hon. Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

** Hon. Edmund Port, Senior District Judge of the Northern District of New York, sitting by designation.

Appendix A

count and the substantive count were precisely the same. however, appellant's argument is without merit.

Appellant does not dispute the lawfulness of his multi-count conviction. Instead, he argues that 21 U.S.C. §§ 846 and 963 are ambiguous regarding punishment and that such ambiguity should be resolved in his favor. *See Simpson v. United States*, 46 U.S.L.W. 4159, 4161-62 (U.S. Feb. 28, 1978); *Prince v. United States*, 352 U.S. 322 (1957). In effect, appellant would have us treat the sentencing here as if it were for armed bank robbery, for which multiple sentences, either concurrent or consecutive, may not be imposed. 18 U.S.C. §§ 2113(a) and (d). *See United States v. Mariani*, 539 F.2d 915, 917 (2d Cir. 1976). This we decline to do. Armed bank robbery is a variation of bank robbery, and the less serious offense merges with the more serious offense. However, a conspiracy is by its very nature quite different than a substantive violation. *See Iannelli v. United States*, 420 U.S. 770 (1975). An attempt merges into the completed crime; a conspiracy does not merge with its object. An attempt requires but one person for the offense; a conspiracy requires at least two. A conspiracy also requires an agreement; an attempt does not. Under the narcotics laws, the crime of conspiracy and the crime of substantively violating the statute are so clearly different that separate convictions are allowed. *See United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975).

Appellant argues that because the crime of attempt and the crime of conspiracy appear together in sections 846 and 963 (attempt and conspiracy treated the same for punishment purposes), and because an attempt merges with the substantive offense, conspiracy should also merge with the substantive offense, at least for purposes of sentencing. He theorizes that Congress did not intend separate and consecutive sentences for conspiracy to distribute or to

Appendix A

possess with intent to distribute and actual distribution or possession with intent to distribute. We do not agree. In *Callanan v. United States*, 364 U.S. 587 (1961), the Supreme Court noted that criminal conspiracies are dangerous to society in ways quite distinct from the dangers of the substantive offenses and that the difference between a conspiracy and a substantive offense is "a distinction whose practical importance in the criminal law is not easily overestimated." *Id.* at 593-94. The Court also explained that federal courts are to attribute "to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different." *Id.* at 594. *See also Iannelli v. United States*, *supra*, 420 U.S. at 779. In the absence of persuasive evidence, we simply cannot accept appellant's argument that Congress intended in 1970 to overrule the distinction between a conspiracy and a substantive violation for purposes of sentencing. *See United States v. Accardi*, 342 F.2d 697, 701 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965).

Appellant's final argument is that the sentence was imposed in an illegal manner in that the district judge relied on inaccurate information or considerations not based on the record. The record clearly refutes this claim. The sentence was within the statutory maximum. It was severe, but, in the opinion of the district judge, so was the offense. We agree.

Affirmed.

Appendix A

JOHN P. FLANNERY II, Assistant United States Attorney, Southern District of New York (Robert B. Fiske, Jr., United States Attorney, Richard D. Weinberg, Assistant United States Attorney, Southern District of New York, of counsel), *for the United States of America.*

PER CURIAM:

This is an appeal from an order entered in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, denying appellant Matthew Madonna's Rule 35 motion to vacate or reduce a 30-year sentence imposed for violation of federal narcotics laws.

Appellant was indicted and convicted on two counts. Count One was for conspiracy to distribute, to possess with intent to distribute, and to import heroin, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 952(a). Count Two was for distribution of heroin and possession with intent to distribute, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A). He was sentenced to 15 years in prison on each count, to be served consecutively, and fined \$25,000 on each count.

Appellant claims that Congress did not intend to allow for consecutive sentences on each conviction "when both crimes stem from the same single act." Appellant's Reply Brief at 2. We note at the outset that appellant was charged and convicted on a conspiracy count which included an element different than anything contained in the substantive count, namely, conspiring to *import* heroin. 21 U.S.C. § 952(a). This element alone, entirely apart from the other conspiracy elements of Count One and from the substantive charges in Count Two, is punishable by imprisonment of up to 15 years and a fine of up to \$25,000 or both. 21 U.S.C. §§ 963, 960(b). Even if the conspiracy

APPENDIX B — ORDER AFFIRMING OPINION

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of September one thousand nine hundred and seventy-eight

Present:

HON. THOMAS J. MESKILL
Circuit Judge

HON. EDWARD DUMBAULD

HON. EDMUND PORT
District Judges

Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW MADONNA, a/k/a "Paul DeRobertis",
SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH
FLORIO, RICHARD KLINGER,

Defendants.

Appendix B

MATTHEW MADONNA, a/k/a "Paul DeRobertis",

Defendant-Appellant.

78-1131

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By: Arthur Feller
Deputy Clerk

APPENDIX C — STATUTORY PROVISIONS INVOLVED

Rule 35:

"Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law."

As amended Feb. 28, 1966, eff. July 1, 1966.

Appendix C

21 U.S.C. §812.

"Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

Appendix C

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (1) Acetylmethadol.
- (2) Allylprodine.
- (3) Alphacetylmethadol.
- (4) Alphameprodine.
- (5) Alphamethadol.
- (6) Benzethidine.
- (7) Betacetylmethadol.
- (8) Betameprodine.

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- (9) Betamethadol.
- (10) Betaprodine.
- (11) Clonitazene.
- (12) Dextromoramide.
- (13) Dextrorphan.
- (14) Diampromide.
- (15) Diethylthiambutene.
- (16) Dimenoxadol.
- (17) Dimepheptanol.
- (18) Dimethylthiambutene.
- (19) Dioxaphetyl butyrate.
- (20) Dipipanone.
- (21) Ethylmethylthiambutene.
- (22) Etonitazene.
- (23) Etoxadine.
- (24) Furethidine.
- (25) Hydroxypethidine.
- (26) Ketobemidone.
- (27) Levomoramide.
- (28) Levophenacymorphan.
- (29) Morpheridine.
- (30) Noracymethadol.
- (31) Norlevorphanol.
- (32) Normethadone.
- (33) Norpipanone.
- (34) Phenadoxone.
- (35) Phenampromide.
- (36) Phenomorphan.
- (37) Phenoperidine.
- (38) Piritramide.
- (39) Proheptazine.
- (40) Properidine.
- (41) Racemoramide.
- (42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) Acetorphine.
- (2) Acetyldihydrocodeine.
- (3) Benzylmorphine.

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- (4) Codeine methylbromide.
- (5) Codeine-N-Oxide.
- (6) Cyprenorphine.
- (7) Desomorphine.
- (8) Dihydromorphine.
- (9) Etorphine.
- (10) Heroin.
- (11) Hydromorphenol.
- (12) Methyldesorphine.
- (13) Methylhydromorphine.
- (14) Morphine methylbromide.
- (15) Morphine methylsulfonate.
- (16) Morphine-N-Oxide.
- (17) Myrophine.
- (18) Nicocodeine.
- (19) Nicomorphine.
- (20) Normorphine.
- (21) Pholcodine.
- (22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) 3,4-methylenedioxy amphetamine.
- (2) 5-methoxy-3,4-methylenedioxy amphetamine.
- (3) 3,4,5-trimethoxy amphetamine.
- (4) Bufotenine.
- (5) Diethyltryptamine.
- (6) Dimethyltryptamine.
- (7) 4-methyl-2,5-dimethoxyamphetamine.
- (8) Ibogaine.
- (9) Lysergic acid diethylamide.
- (10) Marihuana.
- (11) Mescaline.
- (12) Peyote.
- (13) N-ethyl-3-piperidyl benzilate.
- (14) N-methyl-3-piperidyl benzilate.
- (15) Psilocybin.
- (16) Psilocyn.
- (17) Tetrahydrocannabinols.

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Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (1) Alphaprodine.
- (2) Anileridine.
- (3) Bezitramide.
- (4) Dihydrocodeine.
- (5) Diphenoxylate.
- (6) Fentanyl.
- (7) Isomethadone.
- (8) Levomethorphan.
- (9) Levorphanol.
- (10) Metazocine.
- (11) Methadone.
- (12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
- (13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
- (14) Pethidine.

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(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorexadol.

(3) Glutethimide.

(4) Lysergic acid.

(5) Lysergic acid amide.

(6) Methypylon.

(7) Phencyclidine.

(8) Sulfondiethylmethane.

(9) Sulfonethylmethane.

(10) Sulfonmethane.

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(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

Schedule IV

- (1) Barbitol.
- (2) Chloral betaine.
- (3) Chloral hydrate.

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- (4) Ethchlorvynol.
- (5) Ethinamate.
- (6) Methohexital.
- (7) Meprobamate.
- (8) Methylphenobarbital.
- (9) Paraldehyde.
- (10) Petrichloral.
- (11) Phenobarbital.

Schedule V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

Stimulants or depressants containing active medicinal ingredients; exception

(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.

Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247."

Appendix C

21 U.S.C. §841

"Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment."

* * *